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No. 08-934

In The Supreme Court of the United States

COLUMBIA IRON & METAL CO.,
Petitioner,

v.

LINCOLN ELECTRIC COMPANY, AND PROFILE GRINDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents' Brief in Opposition argues that two issues arising in every antitrust class action following a government cartel prosecution should be treated as inconsequential. Their views that the harmless error doctrine can tolerate an instruction expanding the statutory limitations period, and that compliance with the mandated contents of a class notice is a quibble, reveal the need for the Court to impose orderly standards on cases with enormous financial consequences.

I. THE STATUTE OF LIMITATIONS ISSUE.

A. The Statutory Tolling Instruction Was Clearly Erroneous.

Respondents attempt in two brief sentences what the Sixth Circuit consciously avoided, namely to argue that "the underlying [statutory tolling] instruction was ... correct." (Br. in Opposition at 21-22.) They point to the fact that the government investigation led to multiple criminal cases, but they cannot show that any of them qualified for statutory tolling.

Respondents imply that petitioner somehow conceded the relevance of several government cases by showing the trial court a series of different possible tolling dates. What they fail to explain is that no criminal case was filed against petitioner, and no criminal case alleged the same industry-wide conspiracy alleged in the class complaint. Therefore, petitioner simply explained to the trial court that a proper tolling analysis required two steps: (1) to determine whether any of the criminal cases had

sufficient factual links to this case to toll the civil statute of limitations against petitioner and, *if so*, (2) to toll from the commencement of that case. Different time periods were provided only as illustrations of arguable dates to demonstrate to the trial court that it was making a clear error because there was *no* lawful way, using *any* arguably eligible case, to reach back as far as March 1996. There had been no other government case against anyone, and no civil case against petitioner, filed within the one year statutory deadline after the conclusion of the government case filed in March 2000.

B. The Error Was Prejudicial.

With no sound argument on the merits of the instruction imposing excessive statutory tolling, respondents place heavy reliance upon *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), for the proposition that harmless error review applies to that erroneous jury instruction. That point, however, is a red herring, for the application of harmless error analysis has never been in dispute.

Pulido adds nothing to the different and much more precise issue presented by the petition, namely whether an instructional error on which the jury probably depended can be entirely ignored if it is merely possible that the jury could have followed a different instruction. It is this point on which *Stromberg v. California*, 283 U.S. 359 (1931), and *Yates v. United States*, 354 U.S. 298 (1957), turned. *Pulido* did not alter the *Stromberg* and *Yates* holding. Indeed, the *per curiam Pulido* opinion makes it clear that "neither *Stromberg* nor *Yates* had reason to address whether the instructional errors they

identified could be reviewed for harmlessness, or instead required automatic reversal." The principle of *Stromberg* and *Yates* remains valid and important: when there are alternative-theory instructions, one legally acceptable and one not, but it is impossible to know from the record and the verdict whether the jury followed one or the other, then the verdict cannot be affirmed unless the incorrect instruction was itself harmless.

The Court's decision in *Neder v. United States*, 527 U.S. 1 (1999) (cited in *Pulido*), provided a clear statement of the harmless error question in the face of an erroneous instruction: "whether the jury verdict would have been the same absent the error." *Id.* at 19. In this case there is no way to determine that the error was not the sole basis for the judgment entered against the petitioner. The record in this case strongly suggests, as petitioner previously explained (Pet. at 6, 13), that the damages found by the jury were reflective only of the erroneous instruction and that the jury did not regard the fraudulent concealment contention as at all persuasive. The period subsequent to March 2000, which aligns perfectly with the verdict's damages, was the subject of just the statutory tolling instruction which was wrong.

The court of appeals did *not* hold that the verdict was clearly uninfected by the challenged instruction. Nor did it conclude that the verdict "*would have* been the same" with a correct instruction on statutory tolling. Instead, the court contented itself with the view that, "[b]ecause we conclude that the jury *could have* reached the verdict based on the fraudulent concealment theory, we do not reach Columbia's objection to the statutory tolling instruction." (Pet.

App. at 32, emphasis added.) If mere remote possibility of the same result is all that is required, the harmless error standard has been reduced to pure speculation about how a jury with a different but correct understanding of the law might respond. A clear error that probably caused a verdict, which changed the result of a trial, would henceforth be immaterial if a different jury "could" view the evidence on a different instruction as more material and persuasive.

The reliance by the court of appeals upon a second instruction to finesse the statutory tolling error was inappropriate for several reasons. Not only was the verdict logically linked by a simple and transparent calculation to the evidence wholly within the time period established by statutory tolling beginning in March 2000 (so that the normal four years limitation would go back to March 1996), the fraudulent concealment instruction was not provided to the jury as a substitute for statutory tolling. It was not an alternative basis for damages. Rather, fraudulent concealment was explicitly stated as a possible supplement to permit earlier years to be added to the base damages calculation that was stated to be unavoidable: "If you find that plaintiffs have failed to prove any one of these elements [of fraudulent concealment], then you are limited to the post-March 1996 time period outlined in the previous [statutory tolling] 'affirmative defense' instruction." (Jury Instruction, emphasis in original.) Thus, the jury was required to include all of the period after March 1996 in its damages calculation, even if the jury rejected the evidence on fraudulent concealment. Evidence of fraudulent concealment was merely an opportunity to find further damages before March 1996.

There is no reason to believe that the jury credited plaintiffs' arguments and indulged that invitation to go to an earlier period. The amount of the verdict perfectly matches plaintiffs' own damages evidence for the period running from March 1996 to the end of the conspiracy. Respondents do not dispute that stark reality. When the court of appeals stated that "the jury heard evidence upon which it could have found fraudulent concealment even *before* 1996" there is no reason at all to conclude that is what the jury did. Nor is there any evidentiary basis to say that damages before 1996 would have generated the same verdict. Neither respondents nor the court of appeals ever identified any apparent link between the verdict amount and damages for prior years.

Respondents do not dispute the clear parallel between the post-March 1996 period (established by the trial court as a matter of law) and the verdict. The most they have said is that "no witness testified to the amount of damages computed on an annual basis and testified to the amount of damages estimated for the post-1996 time period." There was, however, no need for the jury to recall such focused testimony to implement the statutory tolling instruction without reference to fraudulent concealment. They had the numbers right in their hands. One of the few trial exhibits on damages was the summary prepared by plaintiffs' expert which set forth his "damages computed on an annual basis" for each year from 1996 until the end of the conspiracy. (P.Ex. 521.)

Respondents leap from the statement by the court of appeals concerning the pre-1996 period to argue a non-sequitur that "any error in the statute of limitations instruction would be wholly immaterial if

the jury found fraudulent concealment *beginning* in 1996." (Br. in Opposition at 187, emphasis in original.) They completely overlook the fact that *no* instruction directed the jury to consider fraudulent concealment beginning in 1996. It would be wholly speculative to assume they did so on an uninstructed frolic. Indeed, there was no reason for them even to contemplate that idea since the trial court had already locked in all damages beginning in 1996 with its erroneous instruction. Respondents argue for harmless error in one instruction because it may have been hypothetically possible (but not certain) for a jury to reach the same verdict if it had received an omitted instruction. There is simply no way to conclude, in this Court's words, that "the jury verdict would have been the same absent the error." *Neder*, *supra*.

This record, therefore, squarely presents a case where there must be "grave doubt as to the harmlessness of the error." *California v. Roy*, 519 U.S. 2(1997); *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). If the jury did, indeed, conclude that it should award damages only for the minimum period required by the court, the court's incorrect increase in that time period had the consequence of generating a calculation that, when trebled, exceeded the amounts obtained by the class from prior settlements. It was that difference in time periods which converted the judgment from one which would provide no trial recovery for the class to one creating a net award of over $23 million plus fees and expenses. That demonstration of prejudice was expressly and extensively argued by petitioner.

C. Statutory Tolling Is a Common Problem.

The application of statutory tolling to a private antitrust cartel case is ubiquitous. As the American Bar Association Section of Antitrust Law observed about this petition in Antitrust Trial Practice at 16 (Winter 2009), "[i]n this respect, Columbia raises an important issue."

Virtually every government indictment or information is followed by treble damages class actions where the period of time eligible for the damages claim sets the parameters for the litigation, whether it is eventually resolved by settlement or trial. It has become routine for a grand jury investigation to occupy multiple successive grand juries, thereby stretching an initial period from the previously customary 18 months to several years with long gaps between criminal charges against various subjects of the investigation.

While courts have construed the antitrust tolling statute (15 U.S.C. §16i) to suspend the limitations period during the entire course of overlapping criminal cases, no court has purported to revive tolling from a first government case when a second case was not filed within one year from the end of the first case. Not only would such a practice violate the terms of the statute (any delayed private action "shall be forever barred"), but extended tolling would by definition expand the limitations period by more than 12 months at a minimum.

II. THE CLASS NOTICE ISSUE.

Class procedures may be used to facilitate damages claims by large groups of similarly situated claimants

where common questions of law or fact predominate. Nonetheless, the convenience of a single proceeding requires protection of the rights of absent class members and assurance to a defendant that a class judgment will provide finality against all class members. The technique prescribed by Rule 23 to secure all of those interests is easy but critical: a clear and concise notice to the class of the seven essential features of a Rule 23(b)(3) action "in plain, easily understood language." When one of those features -- arguably the most fundamental and with the greatest ultimate consequences -- is entirely omitted from a notice, the due process function of the class notice has been compromised. This principle is confronted in every Rule 23(b)(3) class action.

Respondents characterize the failure of the class notice to include a mandatory provision - - "the binding effect of a class judgment" - - as a "quibble" that is "trivial." They then defend the notice on the ground that it "was issued without objection." These arguments reflect a disdain for the due process requirements underlying Rule 23(c) and the obligation imposed on the trial court by Rule 23(c)(2)(B) to be sure its notice is proper. They also misrepresent the circumstances of the case and how it reflects problems frequently arising in complex class action damages litigation.

There is no question that the binding effect of a class judgment was not set forth in the only notice ever provided to the class. Respondents naturally endorse the view of the court of appeals that respondents' own drafting error should be overlooked because the notice provided different information from which a class member familiar with litigation could infer that he

would be bound. If an argument that an alert and perceptive class member could read between the lines to comprehend what was omitted is credited, the mandate for "plain, easily understood language" is mocked. The ability of absent class members without legal training or class action experience to make informed decisions about their claims will be forfeited.

Respondents' reliance on issuance of their form of notice "without objection" is deceptive. There was no objection because there was nothing objectionable about that notice for the function it was designed to perform at the time it was issued. As is often the case in multi-defendant antitrust litigation, the court had before it several early settlement agreements and class counsel eager to access those funds. The court reviewed the settlements preliminarily for fairness at a hearing noticed for that purpose. Plaintiffs made the point to the court at that time that non-settling defendants, such as petitioner, had no standing to object to those settlements. The court directed the notice at that hearing. This was a matter between the court, the class, the settling defendants and their counsel.

Rule 23(e) provides for a settlement notice in these circumstances. Instead of alerting all class members to the "binding effect of a class judgment" pursuant to Rule 23(c)(2)(B), a Rule 23(e) notice needs only inform the class that they stand to be "bound by the proposal." The notice is directed to the settlement terms, not to the consequences of later winning or losing a trial. There is no automatic link between a class member accepting the terms of a partial settlement with some defendants and the different decision to participate in subsequent litigation to a final judgment against non-

settling defendants. Accordingly, a Rule 23(e) settlement notice, even in a (b)(3) action, does not require the seven elements for a (c)(2)(B) notice.

The form of notice submitted to the court by respondents with the settlement agreements and approved at the settlement hearing was entirely proper for settlement purposes and was of no concern to the non-settling defendants, but that form of notice was not sufficient for later trial purposes.

III. THE CLASS JUDGMENT ISSUE.

Respondents do not dispute that the judgment failed to comply with the explicit requirement of Rule 23(c)(3)(B). They suggest that the trial court's "defect in the form of the judgment" -- a failure to identify "those to whom the Rule 23(c)(2) notice was directed" -- could be resolved by merely issuing "a corrected judgment." Their suggestion disregards the problem which made clerical correction impossible. The judgment provision of Rule 23 is interlinked with the notice provision. It is obvious that, when a notice did not comply with Rule 23(c)(2), a judgment cannot "include and specify or describe those to whom the Rule 23(c)(2) notice was directed."

CONCLUSION

The petition for a writ of certiorari should be granted.

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